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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE, Plaintiff and Respondent, v. PETER J. CAVANAGH, Defendant and Appellant.	2d Crim. No. B207066 (Super. Ct. No. CR 39815) (Ventura County)

Peter J. Cavanagh appeals from an order finding him in violation of his probation and reinstating probation with modified terms and conditions.

On March 3, 2005, appellant pleaded guilty to two felony counts of knowingly withholding disability insurance deductions from remuneration paid to his workers, in violation of Unemployment Insurance Code[1] section 2110. In exchange for his plea, the prosecution dismissed seven additional felony counts under section 2110; nine felony counts of willful nonpayment of contributions due, in violation of section 2108; two felony counts for willful failure or neglect to furnish reports, in violation of section 2106; and seven misdemeanor counts of failing to withhold payroll taxes, in violation of section 2118. He was subsequently placed on 48 months formal probation, with terms and conditions including that he report to his probation officer and pay $300 a

[1] All further undesignated statutory references are to the Unemployment Insurance Code.

month in restitution plus a monthly $35 administrative fee. A total of $53,976.56 in restitution was imposed, with interest accruing at a rate of 10 percent beginning on July 14, 2005, to be paid jointly and severally by appellant and his wife Teresa in monthly installments of at least $300.

On February 27, 2007, appellant was charged with violating probation by failing to pay restitution after December 19, 2006, and failing to report to his probation officer. Probation was revoked, and the matter was set for further hearing. On May 8, 2007, an amended notice of charged violations was filed alleging that appellant was still failing to pay $300 a month in restitution or report to his probation officer. Another amended notice of charged violations was filed on July 3, 2007, in which it was alleged that appellant had continued to violate his probation as asserted in the prior notices.

On October 16, 2007, appellant filed a demurrer to the notice of charged violations under Penal Code section 1004, subdivision 1. The demurrer alleged that the court lacked jurisdiction to proceed on the matter because appellant had filed a notice of removal in the federal bankruptcy court (bankruptcy court) in January 2005, and no notice of remand had been filed in the superior court.[2]

On January 14, 2008, another amended notice of charged violations was filed on the allegations that appellant had failed to report to his probation officer during the first six months of 2007 and had failed to pay restitution since December 26, 2007. On January 30, 2008, the court tentatively overruled appellant's demurrer and proceeded

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[2] This is not the first time appellant has invoked federal bankruptcy law in an attempt to avoid penalties that have been imposed against him as a result of his willful failure to comply with provisions of the Unemployment Insurance Code. In 1992, the Employment Development Department issued the first of several assessments to recover amounts payable under section 1735 for unemployment insurance contributions and other tax liabilities of appellant's insolvent landscape businesses, Plantica and Rio Seco. Appellant challenged the assessments on the ground that they were stayed by his filing of a bankruptcy petition. Additional assessments were met with new bankruptcy filings. The matter culminated several years later in a published decision concluding that the assessments were exempt from the automatic stays effected by appellant's multiple bankruptcy petitions. (*Cavanagh v. California Unemployment Ins. Appeals Bd.* (2004) 118 Cal.App.4th 83.)

with the contested hearing on the probation violation. On February 7, 2008, the demurrer was overruled and appellant was found in violation of probation.

On March 27, 2008, probation was reinstated on all original terms and conditions with the additional condition that appellant serve 90 days in the county jail. Appellant was remanded to the custody of the Ventura County Sheriff and ordered to appear for a further sentencing hearing on April 8, 2008. On that date, the court imposed a term of two years eight months in state prison, ordered execution of the sentence stayed pending appellant's successful completion of his probation, and modified the previously imposed jail time to 30 days. As a further condition of probation, appellant was prohibited from being self-employed or working for a family member. Appellant's motion to have counsel appointed to represent him in federal court for the purpose of seeking habeas relief was denied.

On April 10, 2008, appellant filed a timely notice of appeal from the April 8, 2008, order finding him in violation of his probation. We subsequently appointed counsel to represent appellant on appeal. After counsel filed a brief raising no issues and requesting our independent review, we notified appellant that he had 30 days in which to advise us of any claims he wished us to consider. Appellant sought and was granted several extensions of time to file a supplemental brief along with a petition for a writ of habeas corpus. On May 5, 2009, he filed a supplemental brief in which he contends the court erred in overruling his demurrer to the notice of charged violations of probation because: (1) the court lacked jurisdiction to act on the charges against him because they are "about bankruptcy administration" and is therefore completely preempted by federal law; (2) the criminal charges amount to a collateral attack on the closed bankruptcy proceedings of his dissolved company, Plantica; and (3) the court was divested of jurisdiction when he filed the notice of removal in January 2005, and the court did not have jurisdiction to thereafter act until after the remand order was filed in December

2005.[3] In asserting that the action is preempted, appellant argues among other things that he is immune from prosecution in the state court because the charges against him are based on conduct undertaken pursuant to his role as the debtor in possession of the Plantica bankruptcy estate.

The court did not err in overruling appellant's demurrer. Over five years ago, appellant pleaded guilty to two felony counts under section 2110 and was granted probation. In exchange for his plea, 25 additional charges against him were dismissed. He did not appeal from that judgment, which has long since become final. By pleading guilty, he acceded to the jurisdiction of the court and admitted committing the crimes with which he was charged. In order to challenge his conviction on jurisdictional grounds, he had to obtain a certificate of probable cause and thereafter file a timely notice of appeal from the judgment of conviction. (Pen. Code, § 1237.5.) He did neither. On the contrary, he expressly waived his right to appeal as part of his plea agreement.

Even if appellant could collaterally challenge his conviction by way of a demurrer in his probation revocation proceedings, the challenge would fail. His jurisdictional challenge is premised in part on the assertion that the prosecution of the criminal complaint against him "is about bankruptcy administration" and is therefore "completely preempted by Federal law." The bankruptcy court plainly found otherwise in remanding the criminal action to the state court following appellant's removal, and the court's order was affirmed by the Bankruptcy Appellate Panel of the Ninth Circuit (BAP).[4] The BAP concluded, among other things, that it lacked jurisdiction over the matter because it was a criminal action. That conclusion is sound. (28 U.S.C. § 1452(a) [providing for removal of "civil actions" to bankruptcy court]; *In re Gruntz* (9th Cir. 2000) 209 F.3d 1074, 1085 [recognizing that criminal cases are not "civil actions" subject

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[3] Appellant raises the same issues in a petition for a writ of habeas corpus that is summarily denied in a separate order filed this same date.

[4] We grant appellant's request for judicial notice of documents and orders filed in the bankruptcy court and the BAP that relate to his notice of removal.

to bankruptcy court removal]; see also 11 U.S.C. § 362(b)(1) [providing an exemption from the automatic stay provisions of the Bankruptcy Code for "the commencement or continuation of a criminal action or proceeding against the debtor"].)

The BAP further recognized the bankruptcy court could have disclaimed jurisdiction on the ground that the notice of removal was filed too late. The Ninth Circuit of the United States Court of Appeals subsequently dismissed appellant's appeal from the BAP's decision, concluding that it lacked jurisdiction to review that decision.[5] The conclusion that the bankruptcy court properly declined to exercise jurisdiction also necessarily forecloses appellant's claim that the state court proceedings against him were an improper "collateral" attack on Plantica's bankruptcy. To the extent appellant asserts the state court lacked jurisdiction to order him to pay restitution while bankruptcy proceedings were pending, or to thereafter find him in violation of his probation for failing to pay said restitution, the law is to the contrary. (See *In re Gruntz, supra*, 209 F.3d at pp. 1085-1086 [statutory exemption from automatic stay in bankruptcy proceedings applies to all criminal prosecutions, even if underlying purpose of proceedings is debt collection]; *In re Heincy* (9th Cir. 1988) 858 F.2d 548, 549-550 [bankruptcy court erred in enjoining state court from enforcing restitution order against debtor in criminal case].)

Appellant's claim that the trial court was divested of jurisdiction by the filing of his notice of removal is also without merit. Removal takes effect not upon the filing of the defendant's notice in *federal* court, but rather upon its filing in *state* court. (Fed. Rules of Bank. Proc., rule 9027(c); 28 U.S.C. § 1446(d); see also *Spanair S.A. v. McDonnell Douglas Corp.* (2009) 172 Cal.App.4th 348, 356, fn. 4.) The record is devoid of any evidence that appellant ever filed his notice of removal in the state court. Because

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[5] (*In re Plantica Landscape Corp.* (May 6, 2008, No. 06-56540) [2008 WL 4878890] (not selected for publication in the Federal Reporter).) Appellant's exhibits reflect that his petition for panel rehearing and his petition for rehearing en banc were both denied.

the notice of removal was never filed in the state court, the state court never lost jurisdiction to enter judgment against appellant.

We have reviewed the entire record and are satisfied that appellant's attorney has fully complied with her responsibilities and that no arguable issues exist. (*People v. Wende* (1979) 25 Cal.3d 436, 441.)

The judgment is affirmed.

NOT TO BE PUBLISHED.

PERREN, J.

We concur:

GILBERT, P.J.

YEGAN, J.

James Cloninger, Judge

Superior Court County of Ventura

Sharon M. Jones, under appointment by the Court of Appeal; Peter J. Cavanagh, in pro. per., for Defendant and Appellant.

No appearance for Plaintiff and Respondent.